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HAROLD B. WILLEY, Cl

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 453

WM. H. MULLER & CO., INC.,
*Petitioner,*

against

SWEDISH AMERICAN LINE, LTD., and
TRANSATLANTIC STEAMSHIP COMPANY, LTD.,
*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November, 1955

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### I. Questions Presented

Two questions are presented by the petition herein: (1) whether an American citizen who purchases a bill of lading is bound by a clause of that bill of lading, validly agreed upon by the Swedish shipper and Swedish shipowner, providing for the determination of any disputes in the courts of Sweden; and (2) whether the District Court abused its discretion in holding that there should be dismissed on the ground of *forum non conveniens* an action for loss of cargo on the high seas brought by an American holder of a bill of lading which contains a binding agreement made by the Swedish shipper and the Swedish shipowner for the determination of any disputes in the courts of Sweden and which provides for carriage of the goods from Sweden to the United States on a Swedish flag vessel, designed in Sweden, built in Sweden, classed in Sweden, maintained in Sweden, manned by a Swedish crew, under

circumstances where the vessel was lost at sea before even reaching an American port, where virtually all of the witnesses are Swedish, and where the substance of the action is that the vessel was not properly designed, constructed, maintained, repaired, and manned.

Petitioner incorrectly, we submit, alleges that in the determination of the foregoing questions, it must be decided whether a citizen of the United States has an absolute right to invoke and maintain the jurisdiction of American courts over his claim.

## II. The Petition for Writ of Certiorari Should be Denied

1. *The case does not turn on whether an American citizen has an absolute right to maintain jurisdiction in American courts.*

Petitioner quite correctly points out that this Court expressly declined in *Swift & Co.* v. *Compania Caribe*[1] to pass upon the question of whether an American citizen has an absolute right to maintain jurisdiction in the courts of the United States. However, we submit that this question *is not now* before this Court and its determination *was and is not necessary* to sustain the decisions of the courts below.

Petitioner urges, at page 9 of the petition, that "an American court may not refuse to try a case brought by an American citizen *unless it feels that injustice would be done by allowing him to proceed in his own court*".[2] (Em-

[1] 339 U. S. 684.

[2] In the case of *Burt* v. *Isthmus Development Company*, 218 F. 2d 353, the Court of Appeals for the Fifth Circuit, following the statement quoted at page 7 of the petition, and after *refusing* to hold that no discretion exists to decline jurisdiction of a suit brought by an American citizen, stated:

> "We do, however, express the view that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country" (218 F. 2d, at page 357).

phasis supplied.) Petitioner thus admits that there is *no absolute right* of an American citizen to maintain suit in American courts.

The District Court below found *as a fact* that injustice would "surely result" if libelant were permitted to maintain the present libel and held that the agreement between the parties to the bill of lading for exclusive jurisdiction in Sweden should be given effect and also that the libel should be dismissed on the ground of *forum non conveniens*.[3]

We submit that the foregoing *determination of fact and exercise of discretion* is not an appropriate question for review by this Court on writ of certiorari.

2. *The decisions below are not in conflict with any decision of this Court.*

Petitioner urges that the 1874 decision of this Court in the non-maritime case of *Insurance Company* v. *Morse*,[4] involving a state statute requiring foreign corporations, as a condition to doing business in the state, to agree not to seek removal to the Federal courts of cases brought against them in the state courts, is controlling in the present case.

We submit that the *Insurance Company* v. *Morse* decision is neither controlling nor applicable by analogy to an Admiralty case. Its statements as to public policy were based upon a line of early common law cases holding that executory arbitration agreements were void. Subsequent to the *Insurance Company* v. *Morse* case, this Court has held that even before the enactment of the arbitration statutes by the various states and by Congress, arbitration agreements in *Admiralty contracts* were valid.[5]

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[3] Opinion of District Court, Appendix to Appellant's Brief before the Court of Appeals, page 16.

[4] 87 U. S. (20 Wallace) 445.

[5] *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109; *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263.

3. *The central issue of this case is not whether the contract was valid, but is one of contract interpretation.*

Despite petitioner's contention, the issue in this case is *not* whether a contractual provision for exclusive jurisdiction in a foreign tribunal is valid.

Such a jurisdiction provision is valid in Sweden where the contract was made, and it is enforceable against the original parties to the contract, and against American citizens subrogated to their rights, in Sweden *and in our courts.*[6]

Thus the issue in this case is not whether an American citizen can contract to "oust" an American court of jurisdiction, but whether a contractual provision enforceable against the original parties to such contract is no longer enforceable, and the shipowner thereby deprived of one of its contractual rights, because an American citizen has by purchase acquired rights under that contract, notwithstanding that he purchased the bill of lading *subject to all the provisions thereof.*[7]

The courts below, two of the most experienced Admiralty courts in this country, have determined this question of contract interpretation contrary to the contentions made by the petitioner below.

There is *no suggestion* in the opinion of the Court of Appeals that it did not consider itself competent to decide this

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[6] *The Belgenland*, 114 U. S. 355, 363; *Mittenthal* v. *Mascagni*, 183 Mass. 19; *The Iquitos*, 286 Fed. 383; *United States M. & S. Ins. Co.* v. *A/S den Norske A. og A. Line* (*The Tricolor*), 1 F. Supp. 934, 65 F. 2d 392; *Cerro de Pasco Copper Corp.* v. *Knut Knutsen O.A.S.* (*The Geisha*), 94 F. Supp. 60, 187 F. 2d 990; *Cerro de Pasco Copper Corp.* v. *The Alabama*, 109 F. Supp. 856; *Atlantic Mutual Ins. Co.* v. *Nederland*, 1955 A. M. C. 620 (not officially reported); *Murillo Ltda.* v. *The Bio Bio*, 127 F. Supp. 13.

[7] *Givaudan Delawanna* v. *The Blijdendijk*, 91 F. Supp. 663, 666; *Mowinckel* v. *Dewar*, 173 Fed 544, 548, modified on other grounds and affirmed 179 Fed 355, cert. den. 218 U. S. 676; *American Steel Co.* v. *Transmarine Corp.*, 36 F. 2d 246, 248.

case and knowingly passed it on to this Court, as petitioner contends at page 5 of the petition.

We submit that this question is not one which requires determination by this Court or which involves any conflict between the Circuits or with past decisions of this Court.

4. *Because the decisions below turned on the reasonableness, under the facts of this particular case, of contractual provisions, the case is not one of general interest.*

Petitioner urges that the question presented here is an important question of federal law which has not been but should be settled by this Court.

The question presented is, we submit, whether it is reasonable to enforce a valid jurisdiction clause against an American purchaser of a bill of lading to which the original parties were a Swedish shipowner and a Swedish shipper and which provides for a shipment from Sweden to the United States on a Swedish flag vessel manned by a Swedish crew and designed, constructed, classed, and maintained in Sweden, under circumstances where the holder of the bill of lading claims that the construction and maintenance of the vessel rendered her unseaworthy and caused her total loss on the high seas before the vessel had even reached a United States port.

The Circuit Court, while holding that the parties to a contract cannot by agreement oust a court of jurisdiction otherwise obtaining, also held that "if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented." [8]

Both courts below have found *as a fact* that under all the circumstances present in this case it is *reasonable* to enforce against petitioner the contractual clause agreed

[8] 224 F. 2d 806, at page 808.

upon by and enforceable between the original parties to the bill of lading from which petitioner's rights are derived.

The decisions below do not, therefore, present a situation, as claimed in the Petition at pages 6 and 8, where American importers will be relegated to foreign courts by the insertion in bills of lading by foreign shipowners of "unilateral" clauses requiring the litigation of disputes in foreign countries. The question is essentially the factual one of *reasonableness,* and under the decisions of the courts below the determination of whether to enforce such a jurisdiction clause will depend strictly upon the particular facts of the case before the court.

The decisions below decide only that when a bill of lading containing a jurisdiction clause valid and enforceable between the original parties thereto is purchased by an American citizen, an American court in which a libel has been filed *in disregard of the contractual provision* has discretion to determine whether an injustice would be done by permitting the American holder of the bill of lading to disregard the jurisdiction clause validly agreed upon between the original parties to the contract, and to determine whether under all the circumstances present in the case it would be reasonable to enforce the clause against the holder of the bill of lading and to decline jurisdiction because of this clause and also on the ground of *forum non conveniens.*

Petitioner fails to suggest any way in which it would be prejudiced by having this litigation in Sweden other than the unsupported reference at page 2 of the petition to "the expense of a referral of the cause" to Sweden. In view of the vital factual issue in this case of the seaworthiness of a Swedish-owned and operated vessel designed, built, and maintained in Sweden and manned by a Swedish crew, we submit that the expenses of both petitioner and respondents would be *considerably less* in Sweden.

In the *Swift* case, this Court stated:[9]

> "But, in any event, it was improper *under the circumstances here shown* to remit a United States citizen to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court." (Emphasis supplied.)

The Court emphasized that the District Court *did* have power to give to the libelant assurances that the respondents would appear in the foreign courts with security equal to that obtained in the District Court. This statement shows, we submit, that this Court found the lower courts in error not because a United States citizen had been remitted to foreign jurisdiction, but because the United States citizen had been remitted to a foreign jurisdiction without assurances that the respondent would appear there and give appropriate security.

In the present case, *neither of these two factors is present.* The carrier has expressly agreed to submit itself to the jurisdiction of the Swedish courts (bill of lading clause 2, quoted at page 5 of the petition) and respondents have deposited with the Swedish court a letter providing irrevocably that the time for suit on all claims arising out of the loss of the Oklahoma shall be extended until six months after final determination by this Court with respect to the petition herein.[10]

In the present suit petitioner has not attached any other vessel or property of respondents, and no security has been given. Since the carrier is a Swedish corporation and owns a very large number of vessels, it is evident that the petitioner herein will be amply secured in Sweden and, if petitioner wishes, can obtain specific security.

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[9] 339 U. S., at pages 697-8.

[10] An officially certified copy of this letter is printed at pages 5-7 of the Appendix to Appellees' Brief before the Court of Appeals.

Accordingly, there is no possibility whatsoever that the petitioner herein does not have complete assurances as to the appearance of the carrier in the Swedish court and as to security in a Swedish suit.

The decisions of the District Court and of the Court of Appeals in this suit very clearly limit the holding of this case to the *particular factual circumstances* present.

We submit that this narrow question is not one important enough to the general public, as distinguished from the litigants concerned in this case, to require that such narrow question be settled by this Court; and that the decisions below do not raise any important question of Federal law which should be settled by this Court.

## III. Conclusion

It is respectfully submitted that the foregoing considerations require denial of the petition for writ of certiorari in this case.

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November, 1955

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*Respondent-Appelle Below.*

## PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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November, 1955.

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